IN THE UNITED STATES OF BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Mirant Corporation, et al.,	§	Case No. 03-46590
	§	Jointly Administered
Debtors.	§	Chapter 11
	§	

Memorandum Opinion and Order

Before the court is The Mirma Landlords' Motion to Compel Payment of Alternative Rent Arising from Mirant Mid-Atlantic, LLC's Termination of Reporting Company Status under the Securities Exchange Act of 1934 (the "Motion"), filed by the Mirma Landlords.[1] The Motion is opposed by Debtors and the Official Committee of Unsecured Creditors of Mirant Corp. (the "Committee" and "Mirant" respectively). The court received evidence and heard argument concerning the Motion on September 1, 2004. Besides the parties' offering joint exhibits, which are described as necessary below, at that time Maurice Moore, an officer of BankOne, testified in support of the Motion. The Mirma Landlords also submitted the deposition of Jennifer Powers, who acted as investment advisor to Mirma in connection with the PEPCO transaction. The court also has before it authorities submitted by the parities.

The court has core jurisdiction over this matter. 28 U.S.C. §§ 1334(a) and 157(b)(2)(A) and (M). This memorandum opinion and order comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

[1] The Mirma Landlords are actually a number of special purpose entities each of which is affiliated with Bank One, N.A. ("Bank One"), Verizon Capital Corp. ("Verizon") or UnionBankCal Corporation ("UBC"). The court will not refer specifically to the special purpose entities herein, but the court's references to Bank One, Verizon or UBC should be read when appropriate as being to their landlord affiliates.

I. **Background**

In December of 2000, Mirant Mid-Atlantic, LLC ("Mirma")[2] entered into a series of transactions with the Mirma Landlords and other parties by which Mirma acquired certain power generation facilities, consisting of real estate and personalty, from Potomac Electric Power Co. ("PEPCO").[3]

Though the transaction was extremely complex and involved hundreds of agreements, many of which are intertwined, in essence Mirant and Mirma financed (a term the court here uses loosely) a substantial part of the purchase of the PEPCO assets through the Mirma Landlords. The Mirma Landlords in turn, in addition to providing approximately $300 million in equity, borrowed approximately $1.2 billion through an offering of notes (the "Pass-through Notes"). Though the Pass-through Notes are not obligations of Mirma, Mirma acted as "issuer" of the Pass-through Notes pursuant to the Securities Act of 1933 (Pass Through Trust Agreement (the "Trust Agreement") p.1). The holders of the Pass-through Notes have been represented in this case by their indenture trustee, U.S. Bank, N.A. ("USB").

In connection with their borrowings, the Mirma Landlords granted to USB to secure the Pass-through Notes liens on the contracts and other assets they acquired (some through leases from Mirma affiliates) in the transaction with PEPCO. The assets were then leased[4] to Mirma. Under the documents, Mirma was required to pay various types of rental to the Mirma Landlords

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[2] Prior to its spin-off with Mirant and other of its affiliates in 2001, Mirma was known as Southern Energy Mid-Atlantic Corp. For convenience, the court will refer herein to Mirma by its present name for all purposes.

[3] The court has described parts of the transaction with PEPCO in a Memorandum Opinion entered June 28, 2004, Adversary No. 04-4073 Mirant Peaker, LLC, et al. v. Southern Maryland Electric Cooperative, Inc. et al. *See also* Mirant Corp. v. Potomac Electric Power Co., (In re Mirant Corp.), 299 B.R. 152 (Bankr. N.D. Tex. 2003; overruled, 303 B.R. 304 (N.D. Tex. 2003); rev'd in part, __F.3d__ (5th Cir. 2004).

[4] The court uses terminology applicable to leases in this memorandum opinion for convenience; the use of these terms is not a finding that all or any of the agreements among Mirma, the Mirma Landlords and others gives rise (or does not give rise) to a lessor-lessee relationship.

from which the Mirma Landlords could satisfy payments due on the Pass-through Notes. Besides required Periodic Lease Rent ("Periodic Rent") (Facility Lease Agreement ("Facility Lease"[5]) § 3.2), the Facility Lease provides under certain circumstances for Supplemental Lease Rent (Facility Lease § 3.3; Supplemental Lease Rent is not at issue at this time). The Facility Lease also provides for payment of Alternative Rent if, *inter alia*, Mirma shall cease to be a reporting company under the Securities Exchange Act. Facility Lease § 3.4.

The Alternative Rent is equal to the Periodic Rent plus an amount equal to an increase in the interest coupons on the Pass-through Notes. The interest rate payable on each Pass-through Note increases by .5% if Mirma ceases reporting. Trust Agreement §§ 5.1 and 4.5(c).

Commencing the evening of July 14, 2003, Mirant, Mirma and, ultimately, 81 of their affiliates commenced chapter 11 cases under the Bankruptcy Code (the "Code")[6] in this court. At the time it filed its chapter 11 petition, Mirma was current in its reporting status under the Securities Exchange Act. However, in September of 2003, Mirma advised the Securities Exchange Commission that it was terminating its reporting status.

Because Mirma had ceased to be a reporting company, USB became entitled to invoke sections 5.1 and 4.5(c) of the Trust Agreement. These provisions mirror Facility Lease § 3.4, increasing the interest rate on the Pass-through Notes upon a cessation of reporting by Mirma. *See* June 17, 2004 USB letter. In turn, by the Motion, the Mirma Landlords, now liable to the

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[5] The Facility Lease the court has in evidence applies only to one of the Mirma Landlords. The parties have represented that all such leases are substantively the same. The court similarly has only one of several presumably identical Trust Agreements.

[6] 11 U.S.C. § 101 et seq.

Pass-through Note holders to pay increased interest on the notes, ask that the court direct Debtors to pay the Alternative Rent.[7]

II. **Issue**

The court can easily state the issue that is presented by the Motion: Are the Mirma Landlords entitled to receive the Alternative Rent instead of the Periodic Rent during Mirma's chapter 11 case pursuant to either Code § 365(d)(3)[8] or Code § 365(d)(10)[9]?

III. **Discussion**

Debtors, joined by the Committee, resist the Motion, principally on two bases. First, Debtors argue that the relationship between the Mirma Landlords and Mirma is not that of lessor and lessee but rather is that of parties to a financing transaction – i.e., the Mirma Landlords are

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[7] Debtors have timely paid the Mirma Landlords the Periodic Rent since commencement of their cases and, so far as the court knows, were current in their obligations to the Mirma Landlords at the time of their filing.

[8] Section 365(d)(3) states:

> (d)(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

[9] Section 365(d)(10) states:

> (10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

properly characterized as secured creditors of Mirma. Since the relationship is not of lessor and lessee, the Mirma Landlords are not entitled to the benefits of Code §§ 365(d)(3) and (d)(10). Second, Debtors urge that the Mirma Landlords should not be paid the Alterative Rent because of section 365(b)(2)(D).[10] Debtors argue that section 365(b)(2)(D) excuses them from paying the Alternative Rent because (1) Mirma's "default" is nonmonetary and (2) the incremental increase from Periodic Rent to Alternative Rent is a penalty.

A. Is the Facility Lease a Lease?

Turning to Debtors' first contention, the court does not have before it sufficient evidence to hold that the Facility Leases (and associated transactions) are or are not leases within the meaning of Code § 365(d).[11] Debtors, though, insist that, since they have filed a complaint seeking to recharacterize the Facility Lease and associated documents as evidencing not leases but rather loans, the court should postpone any decision to require payment of the Alternative Rent until that adversary proceeding is resolved.

Debtors principally rely on *In re Circuit-Wise, Inc.*, 277 B.R. 460 (Bankr. D. Conn. 2002), in which the Connecticut bankruptcy court declined to require payment of rent under section 365(d)(10) pending a determination that a true lease was involved.

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[10] Section 365(b)(2)(D), read in conjunction with section 365(d)(3) or (d)(10), excuses a debtor from performance of "a provision relating to . . . (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease."

[11] The parties have sparred over whether the "leases" fall under section 365(d)(3) (real estate leases) or 365(d)(10) (personal property leases). The distinction is not important in the present context except that section 365(d)(10) permits the court to vary a debtor's obligations to perform based on the "equities of the case." The court is not prepared to hold that the relationship of Mirma to the Mirma Landlords is not a lease of personalty. However, the court notes that section 365(m) as well as its prior holding in Mirant Peaker, LLC, et al. v. Southern Maryland Electric Cooperative, Inc. et al. suggest that section 365(d)(3) is applicable here. The court will thus look to section 365(d)(3) for purposes of this opinion. Were the court balancing equities under section 365(d)(10), granting that BankOne, Verizon and UBC are not the most sympathetic petitioners, the Mirma Landlords would still prevail on the facts before the court.

The court is not persuaded by *Circuit-Wise*. Section 365(d)(3) (and section 365(d)(10)) provide that a trustee "shall timely perform" lease obligations. This language is mandatory in requiring performance by the trustee (here Mirma) until performance is excused by reason of a determination by the court that section 365 is not applicable.

The court agrees with the analysis of the court in *In re The Elder-Beerman Stores Corp.*, 201 B.R. 759 (S.D. Ohio 1996), in which the court declined to adopt reasoning like that later relied on in *Circuit-Wise.* While this court is not prepared to hold that a debtor may never avoid compliance with section 365(d)(3) or (d)(10) pending resolution of the "true lease" issue, this is not such a case. The documents are labeled as leases. The terms of the documents– as they have been presented to the court as of this date – are not inconsistent with a "true lease." In the absence of evidence at least sufficient to rebut the natural assumption that a document is in fact what it purports to be, the court is not prepared to relieve Mirma of compliance with Code § 365(d)(3). The court's determination that Mirma's relationship with the Mirma Landlords is subject to section 365(d)(3) is solely for purposes of the Motion: it was Debtors' burden to persuade the court the Mirma Landlords were other than parties to leases; that burden is not met by mere allegations, even when the allegations are presented in the form of a complaint under Fed. R. Bankr. P. 7001.

Moreover, as the Mirma Landlords suggest, if they are, indeed, secured creditors, not lessors, any monies paid by Debtors will reduce the estates' secured obligations, thus enhancing Mirma's estate. Even if Debtors elect eventually to reject some contracts – leases – which tie them to the Mirma Landlords, open obligations for any unpaid post-petition rent will remain,

entitled to priority status (Code § 503(b)). In short Debtors (Mirma) are not at significant risk[12] if they pay the Alternative Rent.

B. Does Section 365(b)(2)(D) Excuse Debtors from Paying the Alternative Rent?

Under this heading the court must first address whether section 365(b)(2)(D) establishes two independent bases for relieving a debtor from an obligation otherwise enforceable under section 365(d). Two Courts of Appeal have addressed this issue. In *In re Claremount Acquisition Corp.*, 113 F. 3d 1029 (9th Cir. 1029), in the context of a lease assumption, the Court held that section 365(b)(2)(D) applied to excuse cure only of penalties incurred by reason of a non-monetary default. The Ninth Circuit thus adopted a reading of section 365(b)(2)(D) that limits its application to penalties and penalty provisions and excludes from its scope the cure of non-monetary defaults.

The Court of Appeals for the First Circuit has taken a different view. In *Newark Ins. Co. v. Bankvest Capital Corp.,* 360 F. 3d 291 (1st Cir. 2004), that Court held that Code § 365(b)(2)(D) excused a debtor from compliance with (1) a term requiring payment of a penalty rate and (2) provisions relating to a default arising from a failure to perform a non-monetary obligation.

The court concurs with Debtors that *Bankvest's* is the proper reading of the statute. Section 365(b)(2)(D) pointedly uses the word "satisfaction" in describing what the trustee is excused from doing. Typically, if providing for only money obligations, Congress used a term other than "satisfaction." *See, e.g.,* Code §§ 361(1) ("cash payment or periodic cash payments") and 726 ("payment of claims"). In section 365, where money is to be paid, as in section 365(b)(1)(B), Congress used the term "compensate" for "pecuniary loss." See also Code §

[12] The amount involved ($5 million approximately) is well within the means of Mirma, which has accumulated several hundred million dollars since commencement of its chapter 11 case.

1124(2)(C). These provisions suggest that use of the term "satisfaction" is intended to cover more types of cure than simply payment of money. Likewise, other usage of the term "satisfaction" in the Code supports the court's conclusion that "satisfaction" standing alone means more than payment of money. Section 363(f)(5) of the Code refers to a legal requirement that a co-owner of property with a bankrupt estate accept "money satisfaction" (as opposed, e.g., to partition) for its interest. Similarly, Code § 1123(a)(5)(E), referring to satisfaction of a lien, contemplates alternatives to payment.[13]

As for the Ninth Circuit's drafting argument (that, to be parallel to subjections A, B and C, section 365(b)(2)(D) could describe only a single condition; 113 F.3d at 1034), Code § 365(b)(2)(D) is different not only in that it was added independently of the preceding subsections (Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), but also in that it describes a different category of "obligations." Whereas the preceding three subsections deal with *ipso facto* clauses, section 365(b)(2)(D) applies to other types of contractual provisions that are not dealt with as are *ipso facto* clauses. Compare Code § 365(b)(2) to Code § 365(e)(1). Given the peculiar treatment elsewhere in the Code of *ipso facto* clauses, it would be inappropriate to adopt, as did Ninth Circuit, a forced construction of section 365(b)(2)(D) in order to conform to its companion subsections.

Notwithstanding the foregoing discussion, section 365(b)(2)(D) will aid Debtors only if the obligation to pay Alternative Rent arises either as the cure of a nonmonetary default or is, to the extent of the difference from Periodic Rent, a penalty. The court does not consider the

[13] Other Code provisions using the word "satisfaction" relate to voidable transfers and are not inconsistent with the court's interpretation. Code §§ 548(d)(2)(A), 549(b) and 550(b)(1).

obligation to pay the Alternative Rent the equivalent of curing a nonmonetary default.[14] Even assuming, arguendo, that the Mirma Landlords' demand for Alternative Rent amounts to a request to remedy a default resulting from Mirma's termination of reporting status, payment of Alternative Rent clearly does not amount to a "cure" for that default. Rather the requirement to pay the Alternative Rent is a discreet, monetary obligation.

As to Debtors' argument that the .5% rental rate increase is a penalty, the burden is on Debtors to so persuade the court through a preponderance of evidence. These Debtors have not done this. Although the court is not prepared to rule out a later determination that the Alternative Rent is punitive, the evidence before it in connection with the Motion suggests otherwise. In sum, for purposes of Code § 365(d)(3), Debtors have not shown themselves entitled by reason of section 365(b)(2)(D) not to pay the Mirma Landlords the Alternative Rent.

C. Does the Automatic Stay Prevent Payment of Alternative Rent?

Debtors finally argue that the Facility Lease requires that Mirma agree to a new rental schedule. Facility Lease § 3.4(b). Because of the automatic stay of Code § 362(a), they claim, Debtors may not be forced, absent court direction, to agree to such a schedule. While the court has some doubt about the validity of this argument, it chooses to circumvent it by giving Debtors such direction.

IV. **Conclusion**

For the foregoing reason the Motion will be GRANTED without prejudice to a future determination by the court that (1) the relationship between the Mirma Landlords and Mirma is

[14] Debtors argued that the .5% increase in the Alternative Rent was at least "relate[ed] to a default arising from [a] failure . . . to perform [a] non-monetary obligation[s]." Section 17 of the Facility Lease, however, does not refer to a failure to maintain reporting status as an event of default. While Facility Lease § 17(e) incorporates a failure to perform under other documents as an event of default by Mirma, the court has not found in the Trust Agreement and other agreements offered into evidence an *obligation* imposed on Mirma to maintain reporting status.

in whole or in part not governed by section 365 of the Code; and (2) the Alternative Rent includes a penalty. Debtors are directed to take all steps necessary to payment of the Alternative Rent.

It is so ORDERED.

Signed this the ____ day of September 2004.

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HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE